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In The
Supreme Court of the United States
October Term, 1983

PETER KOURAKOS,

Petitioner,

-against-

JAMES H. TULLY, JR., PRESIDENT, and others, MEMBERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

1. Does a condition precedent or special rule of preclusion exist requiring that prior to being allowed or permitted assertion of the privilege against self incrimination (Fifth Amendment to the Constitution of the United States) in an investigative or administrative setting, where no challenge as to its basis is raised, that in order to effect the protections of the Fifth Amendment to the Constitution, demonstration before that body is required to show that disclosure might tend to incriminate or in the alternative should effective enforcement of tax laws take precedence over constitutional protections?

2. Does Section 697(e) of New York Tax Law, which precludes the use of tax returns in most non-tax criminal proceedings negate or frustrate a taxpayer's claim of privilege under the Fifth Amendment to the Constitution of the United States?

3. May the New York State Tax Department, exclusively on the reporting of an amount of income received, deem income from an unknown source to originate from a trade, business or occupation subject to Unincorporated Buxiness Tax solely based on the presumption of correctness which attaches to a notice of deficiency (Tax Law Section 689(e))?

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JURISDICTION

Opinions of the courts below, New York Court of Appeals affirming the judgment of the New York Supreme Court, Appellate Division—Third Department are set forth in Appendix, Infra.

The order of the New York Court of Appeals, the court below, is dated June 16, 1983 and its refusal of a motion for clarification or in the alternative for leave to appeal is dated September 29, 1983, served by mail dated October 13, 1983, received October 19, 1983. The jurisdiction of this court is invoked, made and conferred under 28 U.S.C. 2101 (b)(c)(d) and 2104, Rule

21 of the Supreme Court and the Fifth and Fourteenth Amendments to the Constitution of the United States are involved herein.

STATEMENT OF THE CASE *

A proceeding pursuant to Civil Practice Law and Rules Article 78 was transferred to the New York Supreme Court, Appellate Division—Third Department from Special Term, New York Supreme Court, Albany County to review a determination of the New York State Tax Commission, which sustained a notice of deficiency for Unincorporated Business Tax pursuant to New York Tax Law Article 23.

Petitioner reported "Other Income" in the amounts of $30,000 for 1972 and $37,000 for 1973. Department of Taxation and Finance of New York when it received no response as to the source of this income, deemed it to be business income subject to unincorporated business tax solely due to the refusal of taxpayer to respond. An administrative hearing was requested and held in which petitioner's attorney invoked the privilege against self-incrimination and the Commission sustained the notice of deficiency.

At the administrative hearing as provided by New York Law, the sole challenge to taxpayer's assertion of his Fifth Amendment's rights was:

> "The position of the Audit Division is that Peter Kourakos' income from miscellaneous and other sources as shown on his income tax returns is subject to unincorporated business tax. That there is no self incrimination right that accrues in this kind of tax proceeding because it's not a criminal proceeding and that the only possible penalty is for failure to file the

*There has been no change in the parties involved in the original proceedings.

returns and that's a monetary penalty, that there is no possibility of any jail term or confinement and therefore most of the Supreme Court cases cited by the petitioner are inapplicable."

The Hearing Officer stated that:

"I can understand the position you're taking, you know, and this becomes a public record no matter what we discuss here, when I write my report up, there's nothing I could put aside and say, you know, the protection of the petitioner's right of privacy, right against self incrimination, I can't guarantee you anything.

*** I'm very limited, you know, as far as my approach. I just have to make a determination, is the income subject to U.B.T."

REASONS FOR GRANTING THE WRIT

POINT I

A CONDITION PRECEDENT OR SPECIAL RULE OF PRECLUSION DOES NOT EXIST REQUIRING THAT PRIOR TO BEING ALLOWED OR PERMITTED ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION (FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES) BEFORE AN INVESTIGATIVE OR ADMINISTRATIVE BODY, WHERE NO CHALLENGE AS TO THE PRIVILEGE'S BASIS IS RAISED, THAT IN ORDER TO EFFECT THE PROTECTIONS OF THE FIFTH AMENDMENT TO THE CONSTITUTION, IMPLICIT DEMONSTRATION BEFORE THAT BODY IS REQUIRED THAT DISCLOSURE MIGHT TEND TO INCRIMINATE AND/OR IN THE ALTERNATIVE EFFECTIVE ENFORCEMENT OF TAX LAWS DOES NOT TAKE PRECEDENCE OVER CONSTITUTIONAL PROTECTIONS.

It is apparent that no justification exists for creating such an anomalous rule and like all other governmental agencies, the New York State Tax Department must obey the Constitution.

Subsequent to *U.S.A. v. Leroy Barnes*, 2d Cir., 1979, 604 F.2d 121, 147-149, wherein it was stated that since appellant did not claim the privilege on his return and reported large amounts of income:

1. Fifth Amendment rights were not violated at trial;
2. Prosecutor's summation in which he discussed large sums reported on the return was appropriate.

It is suspect if any question on an income tax return

can be deemed neutral although directed at the public at large.

The United States Supreme Court noting that the Fifth Amendment privilege "is that no person shall be compelled in any criminal case to be a witness against himself . . ." found that "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may for example be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory." *In re Gault*, 387 U.S. 149. The Fifth Amendment privilege against self-incrimination is not self executing.

The privilege against self-incrimination protects the person claiming it from being compelled to give "answers that would in themselves support a conviction" or that "would furnish a link in the chain of evidence needed to prosecute the claimant" for a crime. *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951). The privilege extends to questions propounded in a civil action, whether the claimant is a party or a witness. *Maness v. Meyers*, 419 U.S. 449, 464 (1975); *Kastigar v. U.S.*, 406 U.S. 441, 444-45 (1972). The individual asserting the privilege is not "required to prove the hazard (of incrimination) in the sense in which a claim is usually required to be established in court." *Hoffman*, 341 U.S. at 486; rather the privilege may validly be asserted whenever "the witness has reasonable cause to apprehend danger from a direct answer." Id. That a witness actually fears incrimination from answering questions is not enough. The fear must be reasonable in light of the witness' specific circumstances, the content of the questions, and the set-

ting in which the questions are asked. Id. accord *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 480 (1972); *Malloy v. Hogan*, 378 U.S. 1, 11-14 (1964). *The trial court is to evaluate the incriminatory potential of questions asked.* Hoffman, 341 U.S. at 487. Underlines scored.

If the government desires information protected from compelled disclosure solely to help it to determine tax liability, it should be willing to grant Kourakos immunity from prosecution in order to obtain the information. If the government cannot at this time so confine the use to which it desires to put privileged information, it must obtain the information by some other means other than compelled self disclosure. Based on the State's ability to neutralize Kourakos' potential for self-incrimination via a grant of immunity, it is apparent that a claim of failing or refusing to produce a witness in the party's control is negated and inapplicable. Further the privilege was claimed as a shield, not as a sword. Evasion of taxes was not the basis for refusing to relate the source of the amount of income reported on his return.

Clearly individuals may not be forced to surrender one constitutional right in order to assert another, nor may they be placed in a position where the defense of their property enhances their prosecution for a crime. *Simmons v. U.S.*, 390 U.S. 377, 394 (1968), *U.S. v. U.S. Currency*, 626 F.2d 11 (CA-6, 1980). It is equally true that civil penalties may not be placed upon the exercise or assertion of an individual's privilege against self incrimination.

The information requested is clearly incriminating of one possibly having obtained funds

derived from an illegal source which could furnish a link in the chain of evidence which could be used to prosecute the petitioner herein. Thus it is uncontroverted that petitioner's alleged fear of prosecution was more than fanciful. Where it is not so perfectly evident and manifest that the answer called for cannot incriminate, as to preclude all reasonable doubt of fair argument, the privilege must be recognized and protected. *People ex rel. Taylor v. Forbes*, 143 N.Y. 219, 231.

A Taxpayer is free to refuse to fill in particular items on the tax return and when subsequently questioned as to those admissions, i.e., amount of income received, he may assert his Fifth Amendment privilege against self incrimination. *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942); *Garner v. U.S.*, 424 U.S. 648.

Witness himself is judge in each case whether he is entitled to claim privilege against self incrimination, and he may not be compelled to give testimony by which he himself may, in any manner whatever, pave the way to possible prosecution. *People ex rel. Taylor v. Forbes*, 143 N.Y. 219, 231.

In opposition, the State Tax Commission did not aver that such refusal for non-compliance to reveal the source of income was not based on belief that petitioner stands in danger of criminal prosecution by giving a responsive answer but instead:

> "The position of the Audit Division is that Peter Kourakos' income from miscellaneous and other sources as shown on his income tax returns is subject to unincorporated business tax. That there is no self incrimination right that accrues in this kind of tax

proceeding because its not a criminal proceeding and that the only possible penalty is for the failure to file the returns and that's a monetary penalty. That there is no possibility of any jail term or confinement and therefore most of the Supreme Court cases cited by the petitioner are inapplicable." ps. 13-14 of transcript.

Totally disregarding *In re Gault*, supra; *Maness v. Meyers*, supra; *Kastigar v. U.S.*, supra; *Cudahy Packing Co. v. Holland*, supra; *People ex rel. Taylor v. Forbes*, supra and *Oleshko v. N.Y.S. Liquor Authority*, 285 N.Y.S. 2d 696 Aff'd 288 N.Y.S. 2d 474, 21 N.Y. 2d 778, the latter specifically holding that an administrative body cannot compel one to testify in violation of his Constitutional right.

If challenged, not accomplished here, only a court could demand a factual predicate for the invoking of the privilege raised after which a determination could be made whether the yoke of silence should be pierced or protected. The courts not administrative agencies can only decide as to whether one can properly invoke one's Fifth Amendment privilege. No one in an administrative agency can be granted such an important vehicle as to deny one's Fifth Amendment rights in an arcade and cryptic manner. Petitioner was frustrated from being able to assert or define his basis of the Fifth Amendment Claim and since the basis of his claim was never challenged, it never became necessary to appear before a judge. In the administrative hearing the Hearing Officer on page 8 of transcript stated:

"I can understand the position you're taking, you know, and this becomes a public record no matter what we discuss here, when I write my report up, there's nothing I could put aside and say, you know,

the protection of the petitioner's right of privacy, right against self-incrimination, I can't guarantee you anything."

"*** I am very limited you know, as far, as my approach. I just have to make a determination is the income subject to Unincorporated Business Tax."

Although direct attempts were made for an evidentiary hearing or directly asserting the basis for this claim of petitioner's privilege of self incrimination, solely due to the procedures mandated in a tax proceeding (Civil Practice Law & Rules), the taxpayer was forced to permeate the hearing with suggestions, indicia of potential incrimination and a colorable showing that the privilege applied to him despite the fact that no issue was raised with regard to the validity of his claim.

It is uncontroverted that the privilege against self incrimination may be claimed by counsel for petitioner. As the Court stated in *Maness v. Meyers*, 419 U.S. 449 (1975) a defendant should not be forced to let the cat out "with no assurance whatever of putting it back." Moreover, the State all during this hearing never questioned or challenged the basis for petitioner's Fifth Amendment Claim.

The Appellate Division proffers three reasons for affirming the determination of the State Tax Commission framing the issue that a taxpayer's reliance on the Fifth Amendment to block disclosure is ineffectual unless he made a colorable showing that he is involved in some activity for which he could be criminally prosecuted. This frustrates the fact that a witness by asserting the privilege is the initial arbiter of the legitimacy of the claim, and a presumption exists in favor of the judgment of the witness, which will be

sustained by the Court, unless it is "perfectly evident and manifest" that there is no legitimate claim to the privilege (See *Ronayne v. Lombard*, Sup. Ct., Monroe County, 92 Misc. 2d 693, 697 (1977) and in the extant situation there being nothing in the record to rebut or contradict the validity of petitioner's claim of his privilege, or that the State challenged the basis for such claim at the hearing the Court citing *U.S. v. Verkuilen*, 690 F.2d 648, 654 and *U.S. v. Karsky*, 610 F.2d 548, 550 n5, cert. den. 444 U.S. 1092, stated that "A taxpayer's reliance on the Fifth Amendment to block disclosure is ineffectual unless he made a colorable showing that he is involved in some activity for which he could be criminally prosecuted." It was also stated that if neither the question nor the setting in which it is asked suggests a real and appreciable danger of self incrimination, the taxpayer is obliged to come forward with some indicia of potential incrimination. *U.S. v. Neff*, 615 F.2d 1235, 1240 cert. den. 447 U.S. 925. Thus it was held "that unsupported assertion is an insufficient predicate for the invocation" citing *U.S. v. Verkuillen*, supra and *Edwards v. Commissioner of Internal Revenue*, 680 F.2d 1268, 1270.

It would appear that based on the aforementioned, whenever one appears before any civil proceeding that as a prerequisite to being able to invoke the Fifth Amendment privilege, prior thereto, a foundation therefor is required, contrary to U.S. Supreme Court and New York Court of Appeals decisions. Further that it was irrelevant that petitioner's hearings are permeated with suggestions and a colorable showing that the income originated from an illegal source and direct attempts to come forward with indicia of potential incrimination was prohibited due to the type of

hearings. In addition prior to being able to claim a Fifth Amendment privilege it becomes essential to appear before a judge who apparently must rule irregardless of whether any issue existed pertaining to the validity of the claim, none raised herein, for its foundation, herein deemed required.

To draw such a line of demarcation not only is irrational in view of the nature and substance of the Constitutional right against self incrimination, but operates to deny petitioner his constitutional rights.

First, as was suggested at the hearing on p. 6 that the source of income would not be divulged based on petitioner's right of silence under the Fifth Amendment to the Constitution and it was indicated and suggested at the hearing that the income originated from an illegal source.[1] There can be no doubt that at the least a suggestion and colorable claims were made that petitioner could be criminally prosecuted. Circumstances justifying recognition of the claimed privilege and reasonable cause to apprehend danger from a direct answer were testified to at the hearing.[2] Based on these assertions no challenge per se was made by the State Tax Commission to the validity of the claim made by petitioner.

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1. It cannot be denied that this act gives rise to a permissible inference that Korakos obtained these funds from an illegal source. This inference is made possible by the general obligation to report the source of income and the exception when the report would result in an incriminating disclosure.

2. Moreover it is sufficient if a court can by the use of reasonable inference or judicial imagination conceive a sound basis for a reasonable fear of prosecution present herein.

The cases cited by the Appellate Division in support of this doctrine that a foundation must be made before a Fifth Amendment claim can be asserted differs in the crucial respect in that in *U.S. v. Verkuilen*, 690 F.2d 654 n6 "*** appellant conceded during an in camera discussion with the district judge during the sentencing hearing that his Fifth Amendment claim was not based upon any activities for which he could be criminally prosecuted and in *Karsky*, 610 F.2d 548, 550 n5 it was stated:

> "Karsky never suggested that he was involved in any activity in which he wished not to incriminate himself. He claimed the Fifth Amendment privilege on his return solely because of what he had been told by speakers at tax protest sermons."

U.S. v. Neff, supra at page 1240 stated:

> "Moreover the peculiarities of the case did not strengthen Neff's claim. If anything, the tax protest nature of defense witness Holmes' testimony and the materials that Neff appended to his returns suggest that Neff's refusal to complete the forms was motivated by a desire to protest taxes, rather than a fear of self incrimination."

Further, in *Edwards*, supra at 1270 it was revealed "Appellants steadfastly assert that they have engaged in no criminal activity relating to their auto repair business, nor is any criminal investigation pending."

In the extant situation a valid claim was made by petitioner of his Fifth Amendment privilege against self incrimination. He attempted to directly indicate at the hearing that the hazard was real, substantial,

appreciable and reasonable cause existed for apprehension of such danger. Kourakos is not a tax protestor and he was barred via the Civil Practice Law & Rules and the hearing officer's comments from further testimony. Moreover, the hearing is permeated with suggestions and a colorable showing that the income originated from an illegal source plus the fact that the Respondent at the hearing never questioned petitioner's basis for claiming his constitutional privilege of silence pursuant to the Fifth Amendment to the Constitution. This arbitrary truncation of the Fifth Amendment privilege claim constitutes a deprivation of Constitutional rights. The zeal to protect public revenue must not be able to blind the peril to our free society that lies in a court's disregard of the protections afforded by the Fifth Amendment to the Constitution.

"The power to compel testimony, is not absolute. There are a number of exceptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and it protects against any disclosures that the *witness reasonably believes* could be used in a criminal prosecution or could lead to other evidence that might be so used. This court has been zealous to safeguard the values that underlie the privilege." *Kastigar v. U.S.*, 406 U.S. 441, 444-445 (1972) (Footnotes omitted). Underlines Scores.

The aforementioned would answer Respondent's

claim at the hearing, i.e., no right to claim privilege in a civil tax proceeding.

Moreover, as was recently stated by Justice Marshall in his concurring opinion in *The Pillsbury Co. et al. Petitioners v. John Conboy,* 51 U.S.L.W. 4061, 4066 (1983)

> Whenever a witness is forced to give incriminating testimony, there is significant risk that fruits of that testimony will later be used against him. Further incriminating evidence that is derived from compelled testimony cannot always be traced back to its source.
>
> A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights.
>
> . . . Even their good faith is not a safeguard. For the paths of information through the investigativie bureaucracy may well be long and winding, and even a prosecutor acting in the best faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony."

The situation facing Kourakos is not too dissimilar from that presented to the Seventh Circuit in the *U.S. v. U.S. Coin and Currency in the amount of $8,674.00,* 393 F.2d 499 (7th Cir., 1968) where the Court stated:

"The prospect of a felony conviction involved in Marchetti* of course has a greater coercive effect than the possible loss of money involved herein. On the other hand, the prospect of losing in excess of $8,000 has a substantial coercive effect. In this respect the landmark case of *Boyd v. U.S.*, 116 U.S. 616, 6 S. Ct. 524, 29 L.Ed. 746 is controlling. Boyd was a civil forfeiture action in which the claimant was given a choice between producing a possibly incriminatory document and forfeiting the property. The Court held that such a choice was impermissible under the Fourth and Fifth Amendments. See *Garrity v. State of New Jersey*, 385 U.S. 493, 496-497, 87 S.Ct. 616, 17 L.Ed. 2d 562 which reaffirms and follows Boyd.

* Marchetti v. U.S., 390 U.S. 398, 88 S.Ct. 697 (1968).

As was related in *Shaffer v. U.S.*, (4th Cir., 1976) 528 F.2d 920 "If the government wishes to depose the taxpayer, it should obtain immunity for him as to any criminal proceeding other than one relating to perjury." As was stated in *U.S. v. Fox*, 2d Cir., 1983 , n6, Docket No. 83-6055 10/19/83:

"We do not believe that effective enforcement of the tax laws should take precedence over constitutional protections."

It would appear that the issue presented herein is analagous to *U.S. v. Doe*, 51 U.S.L.W. 3789 (U.S. May 2, 1983) (summarized at 51 U.S.L.W. 3424) granting cert. to *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3rd Cir., 1982).

POINT II

NEW YORK TAX LAW SECTION 697(e), WHICH PRECLUDES THE USE OF TAX RETURNS IN MOST NON-TAX CRIMINAL PROCEEDINGS DOES NOT NEGATE OR FRUSTRATE A TAXPAYER'S CLAIM OF PRIVILEGE UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Appellate Division claims that the hazard of self incrimination through the use of tax returns has been *considerably reduced* with the enactment of Section 697 (subd. (e)) of the Tax Law, which precludes their use in *most* non-tax criminal proceedings, citing *Matter of New York State Department of Taxation & Finance v. New York State Department of Law, Statewide Organized Claim Task Force,* 44 N.Y.2d 575, 581.

The issue of whether income tax returns enjoy any but limited privilege has been addressed by a few courts, none of which have recognized the existence of a general privilege against disclosure.

Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225 (9th Cir. 1975); *Eglin Federal Credit Union v. Cantor Fitzgerald Securities Corp.*, 91 F.R.D. 414 (N.D. Ga. 1981); *Biliske v. American Livestock Insurance Co.*, 73 F.R.D. 124 (W. D. Okla. 1977); *Richland Wholesale Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 40 F.R.D. 480 (D.S.C. 1966); *Reeves v. Pennsylvania R. Co.*, 80 F. Supp. 107 (D. Del. 1948). Rather, a "qualified" privilege emerges from the law that disfavors the disclosure of income tax returns as a matter of general federal policy. *Premium Service Corp. v. Sperry & Hutchinson Co.*, supra, *Credit Life Insurance Co. v. Uniworld Ins. Co.*,

94 F.R.D. 113, 120 (S.D. Ohio 1982); *Tele-Radio Systems, Ltd. v. DeForest Electronics, Inc.*, 92 F.R.D. 371 (D.N.J. 1981); *Smith v. Bader*, 83 F.R.D. 437, 438 (S.D.N.Y. 1979); *Maldonado v. St. Croix Discount, Inc.*, 77 F.R.D. 501 (D. St. Croix 1978); *Payne v. Howard*, 75 F.R.D. 465 (D.D.C. 1977); *Shaver v. Yacht Outward Bound*, 71 F.R.D. 561, 563 (N.D. Ill., 1976); *Federal Savings and Loan Ins. Corp. v. Krueger*, 55 F.R.D. 512 (N.D. Ill. 1972); *Weisenberger v. W. E. Hutton & Co.*, 35 F.R.D. 556 (S.D.N.Y. 1964).

This qualified privilege may be overcome, however, in "appropriate circumstances." *Heathman v. United States District Court*, 503 F.2d 1032, 1035 (9th Cir. 1974); *Fulenwider v. Wheeler*, 262 F.2d 97, 99 (5th Cir. 1958); *Eglin Federal Credit Union v. Cantor Fitzgerald Securities Corp.*, supra, at 416; *Richland Wholesale Liquors, Inc. v. Joseph E. Seagram & Sons*, supra, at 482-483.

Several courts have adopted a two-prong test to guide them in their determination of the appropriate circumstances in which the qualified privilege of tax returns is overcome. That is to say, in order to compel the disclosure of tax returns, the court must be shown that the information sought from the returns bears some *relevance to the subject matter of the litigation;* and that the information sought from the returns is not readily obtainable from other sources. *Eglin Fed. Credit Union v. Cantor Fitzgerald Securities Corp.*, supra; *Tele Radio Systems v. DeForest*, supra; *Smith v. Bader*, supra; *Maldonado v. St. Croix Discount, Inc.*, supra; *Biliske v. American Livestock Ins. Co.*, supra; *Federal Savings and Loan Corp. v. Krueger*, supra at 515; *Richland Wholesale Liquors v. Jos. Seagram & Sons*, supra.

As is readily revealed, New York has not been successful in contesting Federal subpoenas of state tax returns. At the United States District Court level, the courts have simply viewed the issue as a conflict between federal and state power, resolvable by resort to the Supremacy clause of the United States Constitution, i.e., Article VI cl. 2 with the Federal power of course prevailing. See *In re Grand Jury Subpoena for New York State Income Tax Records*, 468 F. Supp. 575, 577 (N.D.N.Y., 1979).

> "Thus, inasmuch as the federal grand jury is a product of the Fifth Amendment and its powers, a result of its long history and specific Congressional attention, the conflict between state confidentiality provisions and Congressional or constitutional investigatory powers has resulted in enforcement of federal grand jury subpoenas despite state statutes, which would otherwise prohibit compliance . . . Compliance with this grand jury subpoena will not, however, subvert New York interest in safeguarding individual privacy because federal grand jury proceedings are conducted secretly. Furthermore, even assuming that honest income tax reporting will be encouraged by protecting New York State income tax returns from grand jury scrutiny, this objective is more than counter-balanced by the necessity of thorough grand jury investigations into violations of federal law—particularly since the State's interest in honest tax reporting will still be protected by the ever present threat of criminal sanctions which may be imposed upon individuals who file false or materially misleading returns."

New York has thus far been foreclosed from appellate review of this issue because a denial of a motion to quash is not a final appealable order. See *In re*

Grand Jury Subpoena for New York State Income Tax Records, 607 F.2d 566, 568 (2d Cir. 1979).

Thus the Court's reliance on the New York State Tax Secrecy Law is misplaced as a basis for abrogating one's Fifth Amendment privilege.

POINT III

THE NEW YORK STATE TAX DEPARTMENT, EXCLUSIVELY ON THE REPORTING OF AN AMOUNT OF INCOME RECEIVED, CANNOT DEEM INCOME FROM AN UNKNOWN SOURCE TO ORIGINATE FROM A TRADE, BUSINESS OR OCCUPATION SUBJECT TO UNINCORPORATED BUSINESS INCOME TAX SOLELY ON THE PRESUMPTION OF CORRECTNESS WHICH ATTACHES TO A NOTICE OF DEFICIENCY PURSUANT TO TAX LAW SECTION 689(e).

Tax Law Section 703 defines an unincorporated business as (a) *** any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity ***.

No evidence appears which links Kourakos to any trade, business or occupation. No rational foundation for this assessment has been established nor is there any evidence which could conceivably support an inference that the taxpayer was involved in any activity let alone one which could be considered a trade, business or occupation. The United States Court of Appeals for the Second and Third Circuits have held

> "We are obliged to conclude therefore that absent proof in the record that Gerardo was involved in gambling activities from April 4, 1966 through August 5, 1966, no court could properly draw an inference of such involvement."

Pizzarello v. U.S., 408 F.2d 579 (2d Cir., 1969) cert. den. 396 U.S. 986 (1970) and *Gerardo v. C.I.R.*, (3d Cir., 1977) 552 F.2d 549. The latter quoting Pizzarello stated at 553

> "Pizzarrello produced no records to contradict the Commissioner's assessment. Nevertheless, the Second Circuit held that the assessment was excessive, arbitrary and without some foundation declaring: there is no proof in the record before us that Pizzarello operated as a gambler for five years . . . No court could properly make such inferences without some foundation of fact." Id. at 583

The absence of adequate tax records (as in the case here) does not give the Commissioner carte blanche for imposing Draconian absolutes, citing *Webb v. C.I.R.*, 394 F.2d 366, 373 (5th Cir., 1968).

The Appellate Division determined that attribution of Miscellaneous Other Income to Unincorporated Business Tax was reasonable, given the other information on petitioner's returns plus presumption of correctness which attaches to Notice of Deficiency. It should be noted that the only items on these returns are petitioner's name and address and prior to the decision in *U.S. v. Barnes, supra*, the amount of income.

As was stated in *Weimerskirch v. Commissioner*, (9th Cir., 1979), 596 F.2d 358, 360:

> In Janis, 428 U.S. 433, 441-442, 96 S.Ct. 3021, 49 L.Ed. 2d 1046 (1976) the Supreme Court decided that the exclusionary rule did not prevent the Internal Revenue Service (IRS) from using illegally-seized evidence as the basis from which to extrapolate a tax-

payer's unreported income from wagering activities. Prior to addressing the exclusionary question, the Court stated that if the illegally-seized evidence could not be used, then the result would be:

> "a naked assessment without any foundation whatsoever.... The determination of tax due then may be one 'without rational foundation and excessive,' and not properly subject to the usual rule with respect to the burden of proof in tax cases." (citations and footnotes omitted)

428 U.S. at 441, 96 S.Ct. at 3026. The Court noted, that there was apparently some conflict between the Federal Courts of Appeals as to the burden of proof in tax cases and then went on to make these observations:

> "However that may be, the debate does not extend to the situation where the assessment is shown to be naked and without any foundation.
>
> "Certainly proof that an assessment is utterly without foundation is proof that it is arbitrary and erroneous."

428 U.S. at 442, 96 S.Ct. at 3026. While the language may not have been dispositive of the issue decided in Janis, supra, it certainly is a strong indication that the Commissioner must offer some foundational support for the deficiency determination before the presumption of correctness attaches to it. After all as the Court observed in *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 (1960)

> "... as a practical matter it is never easy to prove a negative...." 364 U.S. at 218, 80 S.Ct. at 1444. See also *Flores v. United States*, 551 F.2d 1169, 1175 (9th Cir. 1977)

An initial presumption of correctness applies to assessments. At the outset, therefore, taxpayers usually have the burden of producing evidence to refute the validity of the assessment. It devolves at once upon the taxpayer to challenge the assessment. Where it is a negative assertion that a successful taxpayer would have to prove though, the law imposes much less of a burden upon a taxpayer. *Weir v. Commissioner*, 283 F.2d 675, 679 (6th Cir. 1960). Reasonable denials of the assessment's validity have sufficed in such cases to shift the burden back to the government. The government then bears the task of substantiating its assessment in cases of this type. See also *Gerardo v. C.I.R.*, 552 F.2d 549, 552 (3rd Cir. 1977).

Petitioner denies that he is subject to Unincorporated Business tax. The proof required, i.e., negative assertion, justifies use of the lighter burden and allocation of the ultimate risk of non persuasion on the government. See generally C. McCormick, Handbook of the Law of Evidence, sec. 378; J. Wigmore, Evidence sec. 2485 (discussing apportionment consideration).

Indeed the burden of proof could not otherwise be allocated without risking violation of petitioner's privilege against self incrimination. In *Grosso v. U.S.*, 390 U.S. 62, 65-69, 88 S.Ct. 709, 19 L.Ed. 2d 706 (1968), the Supreme Court ruled that the Fifth Amendment privilege against self incrimination precluded federal criminal prosecutions for failure to file the required wagering tax forms. As the basis of the Court's decision was the Hobson's choice the Federal Wagering tax laws pose to gamblers. Prior to the Grosso decision, a gambler had no choice but to

file returns and pay the tax and possibly incriminate himself under state law, or not comply and possibly incur a federal penalty. To preserve the efficacy of the self incrimination privilege, the court prohibited the imposition of certain criminal sanctions for failure to comply with the wagering tax laws.

The choice between self incrimination and undue forfeiture looms no less ominously in the context of a civil action. One reporting income derived from an illegal source who desires to challenge the correctness of an assessment runs the high risk of incriminating himself. The government may impose an assessment as in the extant situation solely from bare surmise, conjecture, speculation and rumor when in fact none is due. To show error in the assessment, a taxpayer may have no choice but to divulge the inculpating details of an illegal involvement and thus expose himself to prosecution. If a prudent taxpayer decides not to challenge the assessment lest he invite another criminal prosecution, this often averts self incrimination only at the cost of unwarranted tax liability. To allow one reporting income from an illegal source to disprove an assessment only by a preponderance of evidence could penalize the exercise of the privilege against self incrimination in a manner that the Supreme Court outlawed in Grosso.

The aforementioned burden of proof accomodates both the privilege against self incrimination and the presumption of accuracy normally accorded to government tax assessments. It neither forces the protesting taxpayer to expose himself to other criminal liabilities nor robs the government of the advantage gained by the initial presumption. It merely spares the taxpayer from the threat of self incrimination by requiring the government to justify its claim.

It is well established that compulsion of potentially self incriminating testimony is permissible only where the witness is provided immunity protection which is coextensive with his constitutional privilege against self incrimination. Immunity statute represents an accomodation between the government's need, in certain circumstances to compel testimony from knowledgeable citizens and a citizen's constitutionally based privilege against self incrimination under the Fifth Amendment of the Federal Constitution and Article I, Section 6 of the New York State Constitution.

The Commissioner offered no evidence linking Kourakos to any activity that could be deemed subject to Unincorporated Business Tax. No evidence was proferred from which it could even be inferred that he engaged in any activity subject to Unincorporated Business Tax. Thus the assessment falls of its own weight as wholly without support. There has not been the "protection of the individual against arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process. See *Slochower v. Board of Ed. of N.Y.*, 350 U.S. at 559. citing *Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S., 292, 302.

CONCLUSION

It is respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,

MURRAY APPLEMAN
Attorney for Petitioner
A Member of the Bar of the
United States Supreme Court

APPENDIX "A"
ORDER DATED SEPTEMBER 29, 1983

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of September, A.D. 1983.

PRESENT:
HON. LAWRENCE H. COOKE
Chief Judge, presiding.

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of
PETER KOURAKOS,

Appellant,

For a Review etc.,

vs.

JAMES H. TULLY, JR., President, & ors.,
Members constituting the State Tax Commission
of the State of New York,

Respondents.

A motion having heretofore been made herein upon the part of the appellant for clarification of this Court's order of dismissal dated June 16, 1983 or, in

the alternative, for leave to appeal to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied in each respect.

s/Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

APPENDIX "B"
ORDER DATED JUNE 16, 1983

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Sixteenth day of June, A.D. 1983.

PRESENT:

HON. LAWRENCE H. COOKE,
Chief Judge, presiding

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of PETER KOURAKOS,

Appellant,

vs.

JAMES H. TULLY, JR., President, & ors.,
Members constituting the State Tax Commission
of the State of New York,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

s/Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

APPENDIX "C"
DECISION DATED MARCH 24, 1983

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

In the Matter of PETER KOURAKOS,

Petitioner,

v.

JAMES H. TULLY, JR., et al.,
Constituting the State Tax Commission,

Respondents.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission which sustained a notice of deficiency for unincorporated business taxes pursuant to article 23 of the Tax Law.

Petitioner and his wife filed New York combined income tax returns covering the years 1972 and 1973 upon which petitioner reported receiving "other income" of $30,000 and $37,000, respectively. When petitioner failed to respond to a request for information concerning the source of this income, the Department of Taxation and Finance issued a notice of deficiency informing petitioner it deemed the "other income" to be business income and subject to an unincorporated business tax of $2,585 plus interest and

penalties. Upon petitioner's request for a redetermination, a hearing was held at which petitioner neither appeared nor offered any evidence. However, on petitioner's behalf his attorney invoked petitioner's privilege against self incrimination; it is urged that petitioner has a constitutional right to remain silent as to the origin of the income. The commission sustained the notice of deficiency and this proceeding ensued.

Although petitioner maintains that the rationale of *Garner v. U.S.* (424 U.S. 648), in reaffirming *U.S. v. Sullivan* (274 U.S. 259), justifies his refusal to divulge the derivation of his "other income," we find it unnecessary to even confront this proposition. A taxpayer's reliance on the Fifth Amendment to block disclosure is ineffectual unless he has made "a colorable showing that he is involved in some activity for which he could be criminally prosecuted" (*U.S. v. Verkuilen*, 690 F 2d 648, 654; see *U.S. v. Karsky*, 610 F 2d 548, 550, n. 5, cert. den. 444 U.S. 1092). If neither the question nor the setting in which it is asked suggests a real and appreciable danger of self incrimination, the taxpayer is obliged to come forward with some indicia of potential incrimination (*U.S. v. Neff*, 615 F 2d 1235, 1240, cert. den., 447 U.S. 925). Nothing in this record, apart from his counsel's assertion to that effect, indicates that revelation of the source of petitioner's other income will bring to light his involvement in any criminal activity. That unsupported assertion is an insufficient predicate for the invocation of the privilege (*U.S. v. Verkuilen, supra;* see *Edwards v. Commissioner of Internal Revenue*, 680 F 2d 1268, 1270).

We note also that the hazard of self incrimination through the use of tax returns has been considerably reduced with the enactment of section 697 (subd. [e]) of the Tax Law, which precludes their use in most non-tax criminal proceedings (see *Matter of New York State Dept. of Taxation & Fin. v. New York State Dept. of Law, Statewide Organized Crime Task Force*, 44 NY 2d 575, 581), making it unavoidable that the taxpayer show something other than a vague and unexplained fear of incrimination.

The argument that the assessment of an unincorporated business tax was without foundation is meritless. Given the other information on petitioner's return, attribution of miscellaneous other income to an unincorporated business was obviously reasonable. Furthermore, the failure of petitioner to produce any evidence demonstrating that the assessment was erroneous leaves standing the presumption of correctness which attached to the notice of deficiency (Tax Law, §689, subd. [e]; *Matter of Tavolacci v. State Tax Comm.*, 77 A D 2d 759).

Determination confirmed, and petition dismissed, with costs.

KANE, J. P., MAIN, MIKOLL, YESAWICH, JR., and LEVINE, JJ., concur.